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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

[Propriety of ~~Payment~~ for Retroactive Pay Increases For School Employees] 9900

FILE: B-192528

DATE: April 20, 1979

MATTER OF: Fort Rucker Elementary School Employees

- DIGEST:
1. Persons employed to work at Federal dependents' schools are subject to all laws pertaining to Government employment except those for which an exemption is expressly authorized under 20 U. S. C. § 241(a) (1976); therefore, school employees are covered by the Back Pay Act of 1966, 5 U. S. C. § 5596.
 2. Under 20 U. S. C. § 241(a), persons "may" be employed to work at Federal dependents' schools without regard to certain civil service laws, including those pertaining to the General Schedule pay rates, but the provisions of such laws may nevertheless be extended to school employees by operation of administrative directives and contract clauses.
 3. Section IV, Army Procurement Procedure, directed that a clause be included in dependents' school personal service employment contracts reserving to school officials the right to amend the rate of pay in conformity with the pay schedules of Department of the Army civilian employees performing similar duties; hence, the Fort Rucker Elementary School Board had the right to adopt a policy of having all clerical, janitorial, and other non-teaching positions at the school classified and equated to comparable civil service positions for pay purposes.
 4. The Fort Rucker Elementary School Board adopted a policy in 1969 of paying school support personnel on an equivalent basis with Federal general schedule (GS) and wage board (WG) employees, but support personnel pay was "frozen" between April 1974 and March 1977 as the result of an erroneous opinion by Army procurement officials that there could be "no such thing as a GS/WG equated contract employee." The support personnel therefore suffered an unjustified or unwarranted personnel action within the terms of the Back Pay Act, 5 U. S. C. 5596, and are entitled

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to backpay for cost-of-living and step increases withheld from them.

This action is in response to a letter dated July 14, 1978 (file reference ATZQ-RM-FA), with enclosures, from Major B. G. Poole, FC, Finance and Accounting Officer, Fort Rucker, Alabama, requesting an advance decision as to the propriety of making payments on vouchers totalling \$21,562.00, representing retroactive pay increases covering the period from April 1974 to March 1977 for civilian employees holding non-teaching positions with the Fort Rucker Elementary School. The request was forwarded here by the Office of the Comptroller of the Army by letter dated July 31, 1978 (DACA-FAF-C).

The request for an advance decision concerns the eligibility of employees holding administrative, clerical and custodial positions with the Fort Rucker Elementary School to receive retroactive salary and wage adjustments for the years 1974-1977, so as to make their pay rates conform to directives which were applicable to most other Federal employees during that period.

It is indicated that all of the individuals concerned were employed at the school on the basis of annual personal service contracts. Each contract contained the following clause relating to pay rates:

"The rate of pay as shown herein has been certified by the Fort Rucker Elementary School Board as fair and equitable and in general accord with the pay schedules for similar positions in selected comparable public school systems in surrounding localities. However, the right is reserved by the Elementary School Board, Fort Rucker to amend the rate of pay, either by increases or decreases, to include retroactive adjustments if pay schedules in selected comparable public school systems are changed, or if verification of certification requirements cause rate of pay changes, or if existing pay schedules for Department of the Army civilian employees performing similar duties on the same installation are changed." (Emphasis supplied.)

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This clause was included in each school employment contract as directed by section IV, Army Procurement Procedure (1969 ed., Rev. 6, superseded), issued by the Secretary of the Army.

It is further indicated that effective July 1, 1969, the Fort Rucker Elementary School Board adopted a policy of having all clerical, janitorial, and other non-teaching positions classified and equated to comparable civil service positions. Under this policy and the above-quoted provision concerning pay rates, school support personnel were paid on an equivalent basis with Federal General Schedule (GS) and wage board (WG) employees, and they were given equivalent cost-of-living increases and step increases authorized for civil service employees. The policy was followed continuously from July 1969 until April 1974.

However, on April 12, 1974, the President signed Executive Order No. 11777 to provide pay raises for Federal employees, and the support personnel of the Fort Rucker Elementary School were denied the benefits of that order. It does not appear that this was the result of a policy revision or any other action taken by the school board. Rather, it appears that certain Army procurement officials reviewed the matter and concluded that the employees were not then, and never had been, entitled to be paid on the same basis as Federal GS and WG civil employees. Essentially, those procurement officials were of the opinion that there could be "no such thing as a GS/WG equated contract employee," and that the contract employees' pay rates should instead be set in accordance with Army Procurement Procedure § 4-5603(c) (1969 ed., Rev. 6, superseded), which provided:

"(c) Contracts shall be negotiated on the basis of and shall provide for a rate of pay which is in general accord with pay schedules for similar positions in selected comparable school systems in the state in which the dependents school is located."

On the basis of local wage surveys, it was estimated that Fort Rucker Elementary School support personnel were being paid at rates which exceeded the pay schedules for persons holding similar positions in comparable school systems in the State of Alabama. Army procurement authorities concluded that the employees were not eligible for a pay increase under Executive Order No. 11777, April 12, 1974, and

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thereafter the pay rates of administrative, clerical, and custodial positions at the school remained "frozen" until March 1977.

It appears that this action caused some controversy, and eventually led to the issuance of the following directive on March 3, 1977, by the Secretary of the Army concerning the Fort Rucker Elementary School;

"Non-certified support personnel in the case of 'blue collar' employees are to be paid salaries comparable to Wage Board personnel, to include pay-adjustments when applicable. In the case of clerical employees, non-certified support personnel are to be paid salaries comparable to the Civil Service General Schedule, to include pay-adjustments when applicable."

It appears that the clerical, janitorial, and other non-teaching positions at the school were then, again, classified and equated to comparable civil service positions. It also appears that on April 26, 1978, the school board passed a resolution that the affected employees be granted the pay raises that were withheld from them in the interim period from April 1974 to March 1977.

The submission presents a number of questions concerning the propriety of granting those retroactive pay increases. In effect, it is questioned whether the Army Secretary's March 3, 1977 directive or the school board's April 26, 1978 resolution may properly be given retroactive application. In that connection, it is also questioned whether this would require a modification of the personal service contracts covering the years 1974-1977, and if so, whether modifications may lawfully be made to completed contracts in succeeding fiscal years. However, for the following reasons we find it unnecessary to address those questions or concerns.

Section 6 of Public Law 874, 81st Congress, ch. 1124, 64 Stat. 1100, 1107, approved September 30, 1950, as amended, and codified as 20 U.S.C. § 241 (1976), directs that schools be provided for children living on Federal property when no local educational agency is able to provide suitable comparable free public education for such children. Section 6 as originally enacted contained no provision relating to the employment of personnel required to operate those schools. However, amending legislation subsequently authorized

such personnel to be employed under conditions exempting them from certain of the civil service laws and regulations applicable to most other Federal employees. With respect to such exemptions, 20 U. S. C. § 241(a) (1976) provides in pertinent part as follows:

"* * * For the purpose of providing such comparable education, personnel may be employed and the compensation, tenure, leave, hours of work, and other incidents of the employment relationship may be fixed without regard to the Civil Service Act and rules and the following: (1) chapter 51 and subchapter III of chapter 53 of title 5; (2) subchapter I of chapter 63 of title 5; (3) sections 5504, 5541 to 5549, and 6101 of title 5; (4) sections 3305(b), 3306(a) (2), 3308 to 3318, 3319(b), 3320, 3351, 3363, 3364, 3501 to 3504, 7511, 7512 and 7701 of title 5; and (5) Chapter 43 of title 5. * * *" (Emphasis supplied.)

This provision, as codified, is derived from section 2 of Public Law 89-77, 79 Stat. 243, July 21, 1965. The legislative history of Public Law 89-77 indicates that the provision was enacted as the result of draft legislation submitted to Congress by the Secretary of the Army, who at the time stated, "Based upon the Department's experience in operating section 6 schools, it is highly desirable that the personnel practices for instructional personnel be patterned after those usually encountered in the teaching profession rather than those which have been developed for the Federal service as a whole." See Senate Report No. 311, June 9, 1965.

It is therefore to be noted that this provision was intended to apply primarily to members of the teaching profession, in recognition of the fact that instruction schedules do not coincide with civil service work-hour and leave policies. Thus, even though under 20 U. S. C. § 241(a) persons employed in clerical, custodial, and other non-teaching positions "may" also be exempted from certain civil service laws, a review of the contracts of the support personnel in question discloses that most were required to work under a civil service type of schedule and were made subject by provisions of contract to the Annual and Sick Leave Act of 1951, as amended, chapter 63 (subch. I) of title 5, United States Code, from which they could have been exempted.

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Furthermore, it is also to be noted that the above-quoted provision of 20 U.S.C. § 241(a) does not authorize the exemption of persons employed in connection with "section 6" schools from every provision of title 5 of the United States Code. In particular, while such employees "may" be exempted from the General Schedule pay rates contained in subchapter III of chapter 53, title 5, no similar exemption is expressly authorized with respect to the Back Pay Act of 1966, codified as 5 U.S.C. § 5596.

This Office has consistently held that "section 6" school employees are subject to all statutes pertaining to Government employment except those for which an exemption is expressly authorized. 52 Comp. Gen. 291 (1972). See also decisions B-138773, May 15, 1959; B-183804, November 14, 1975; B-187881, October 3, 1977. Thus, "section 6" school employees are covered by the Back Pay Act, 5 U.S.C. § 5596. See decision B-192568, December 8, 1978. Moreover, we recognize that the exempted provisions of title 5 may be extended to "section 6" school employees by operation of administrative directives and contract clauses.

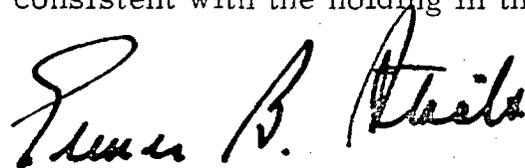
Insofar as here pertinent, the Back Pay Act, 5 U.S.C. § 5596, authorizes payment of compensation to employees who, on the basis of an administrative determination or a timely appeal are found by appropriate authority to have been affected by an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials. The Comptroller General is an "appropriate authority" to determine whether an employee has suffered a withdrawal or reduction of pay as the result of an unjustified or unwarranted personnel action under applicable law or regulation, and to grant appropriate relief. 5 C.F.R. § 550.803(d) (1978).

In the present case, it appears that the entire controversy was the result of disagreements among various Army authorities with respect to the proper interpretation of somewhat inconsistent provisions of the Army Procurement Procedure. It is our view that under the Army Procurement Procedure the right was reserved to the Fort Rucker Elementary School Board to amend the rate of pay of school employees, and that the school board had the right to

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adopt a policy of having all clerical, janitorial, and other non-teaching positions classified and equated to comparable civil service positions. Moreover, it appears that such policy was adopted by the school board in 1969. Our view is that the policy was mandatory and remained in effect during the period here in question, notwithstanding the action of the procurement officials. We therefore find that under the applicable provisions of law and regulation, and the mandatory policy, all of the employees in question were entitled to be paid on the basis of Federal civil service pay rates after July 1, 1969, and that they were affected by unjustified and unwarranted personnel actions from April 1974 to March 1977 through the withdrawal of cost-of-living increases and step increases authorized for civil service employees.

Accordingly, we hold that the employees in question are entitled to backpay under 5 U.S.C. § 5596, to be computed in accordance with 5 C.F.R., part 550, subpart H. The submitted vouchers are returned for further processing consistent with the holding in this decision.



Comptroller General
of the United States